No. 87-5565

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CHERLYN CLARK,
Petitioner,
v.
GENE JETER,
Respondent.

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF THE PETITION

The Women's Legal Defense Fund ("WLDF") respectfully moves, pursuant to Rule 36.1 of the Rules of this Court, for leave to file the attached brief as amicus curiae. The consent of counsel for the Petitioner has been obtained. Counsel for Respondent has refused consent.

WLDF is a tax-exempt organization which represents men and women challenging barriers to sexual equality. Because of the high rate of poverty among single women and their children, WLDF is particularly concerned with legal issues relating to, and engages in educational and other public projects designed to promote and protect, the rights of such individuals. WLDF regularly repre-

sents the interests of single women and their children, among others, before the courts and the United States Congress. Such representation constitutes an important aspect of WLDF's activities and includes participation as amicus curiae in significant cases before this Court.

The decision below—that a six-year statute of limitation which restricts an individual's ability to establish paternity in child-support actions is both constitutional and legally viable, despite the recent enactment of a federally-mandated eighteen-year limitation period for such actions—raises grave concerns for the individuals whom WLDF represents. That decision significantly limits the already substantial number of non-marital children, or their mothers, who may bring paternity suits against absent fathers and, as a result, obtain the necessary support to which they are entitled. Indeed, according to U.S. Census Bureau figures, over 1.6 million of the more than two million never-married mothers heading single parent families as of the spring of 1986 had not been awarded child support payments from absent fathers. *See* Bureau of Census, U.S. Department of Commerce, *Child Support and Alimony: 1985, Current Population Reports*, Series P-23, No. 152, at 2-3 (Tables B and C). At least 85,000 of such women could not obtain a child support order because they were unable to establish paternity. *Id.* at 12 (Table 2). The decision below can only exacerbate this unconstitutional deprivation.

Thus, the overall effect of the decision below is to force mothers to bear a disproportionate share—or in some cases all—of the child support obligations imposed on both parents by state law. The decision below, if it stands, will predictably promote, rather than thwart, the feminization of poverty and, concurrently, increase public welfare burdens. Necessarily, the ramifications of this case, both within and outside Pennsylvania, will directly affect WLDF's constituency. It is for this reason that WLDF requests permission to submit this brief.

WHEREFORE, WLDF respectfully requests that its Motion be granted.

Respectfully submitted,

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October 1987

QUESTIONS PRESENTED

1. Does a six-year statute of limitation for actions brought to establish paternity in support actions for children born out of wedlock violate the equal protection guarantee of the Fourteenth Amendment of the United States Constitution?

2. Is Pennsylvania's current eighteen-year paternity statute of limitation, which has been construed to be not retroactive to cases pending on appeal or previously barred by the now repealed six-year statute, inconsistent with the language and intent of the federal Child Support Enforcement Amendments?

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BRIEF AMICUS CURIAE FOR THE WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE

The interest of the Amicus is stated in the Motion for Leave to File, to which this brief is attached.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

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[1] The Amicus adopts the Statement of the Case set forth in the Petition.

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 6704(e) of Title 42 of the Pennsylvania statutes provides:

> (e) *Limitation of actions.*—All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father.

42 Pa. Cons. Stat. Ann. § 6704(e) (Purdon 1982), (*repealed by* Act of Oct. 30, 1985, Pub. L. 264, No. 66 § 3 (Purdon Supp. 1987).

Section 4343(b) of Title 23 of the Pennsylvania statutes provides:

> (b) *Limitation of actions.*—An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child.

23 Pa. Cons. Stat. Ann. § 4343(b) (Purdon Supp. 1987).

REASONS FOR GRANTING THE WRIT

I. State Courts' Disparate Treatment of Equal Protection Claims Involving State Paternity Statutes of Limitation Can Only Be Resolved By This Court.

This case presents a critical issue of constitutional proportions: whether a state statute, which imposes a six-year statute of limitation on actions brought on behalf of children born out of wedlock to establish paternity for purposes of support, violates the equal protection clause of the Fourteenth Amendment. Not without reservations, the court below concluded that it does not. *Clark v. Jeter*, 358 Pa. Super. 550, 518 A.2d 276 (1986), *appeal denied*, 527 A.2d 533 (1987). That decision exemplifies the confusion among state courts concerning this important issue.

In recent years, this Court has twice recognized the important equal protection issues raised by paternity statutes of limitation. In *Mills v. Habluetzel*, 456 U.S. 91 (1982), and *Pickett v. Brown*, 462 U.S. 1 (1983), the Court struck down one- and two-year statutes of limitation governing child support-related paternity actions. It did so because, notwithstanding state interests in preventing stale and fraudulent claims, such restrictive statutes provide an inadequate opportunity to file a paternity claim. Whether "longer periods of limitation for paternity suits also may be unconstitutional" because they, too, fail to meet the reasonable opportunity test was recognized, but left open. *Mills v. Habluetzel*, 456 U.S. at 106 (O'Connor, J. concurring).[2]

Moreover, state courts confronted with the constitutionality of longer limitation periods for establishing paternity have reached widely varying results. While

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[2] Indeed, this Court has previously noted probable jurisdiction to review the claim that Pennsylvania's six-year statute of limitation in paternity actions violates the equal protection clause. *Paulussen v. Herion*, 334 Pa. Super. 585, 483 A.2d 892 (1984), *prob. juris. noted*, 474 U.S. 899 (1985). When Pennsylvania enacted its current 18-year statute of limitation in October 1985, the Court vacated the judgment in *Paulussen* and remanded the case for determination whether the 18-year statute would be applied to pending cases that had been barred under the six-year statute. *Paulussen v. Herion*, 457 U.S. 557 (1986). On remand, the Pennsylvania Superior Court found that the statute should not be retroactively applied (359 Pa. Super. 520, 519 A.2d 473 (1986)); this determination is currently being challenged in a related proceeding and an extension of time until December 17, 1981 was recently granted for the submission of an appeal to this Court. No. A-279 (U.S. Oct. 7, 1987) (Brennan, J.).

Pennsylvania has upheld a six-year limitation period,[3] Oregon has found a six-year period to be insufficient to satisfy equal protection concerns.[4] Similarly conflicting results have been reached by a number of other states with respect to the constitutionality of five-year limitation periods,[5] while three- and four-year periods have generally been found constitutionally infirm.[6]

This patchwork of holdings—including that of the court below—cannot be reconciled with the equal protection standards articulated in *Pickett* and *Mills*. Those decisions establish that state statutory restrictions on paternity actions brought on behalf of children born out of wedlock can survive equal protection scrutiny only if:

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[3] *Astemborski v. Susmarski*, 502 Pa. 409, 466 A.2d 1018 (1983).

[4] *State ex rel. Adult & Family Services Div. v. Bradley*, 58 Or. App. 663, 650 P.2d 91 (1982), *aff'd*, 295 Or. 216, 666 P.2d 249 (1983). In finding that criminal non-support actions must also be brought within six years, Massachusetts courts have questioned whether a similar limitation period on the adjudication of paternity claims "could pass muster on equal protection grounds." *Commonwealth v. Gruttner*, 385 Mass. 474, 432 N.E.2d 518, 521 n.3 (1982).

[5] The courts of Alabama and New York have split over the constitutionality of a five-year statute. *Compare Morgan County Dept. of Pensions ex rel. Ryan v. Kelso*, 460 So. 2d 1333 (Ala. Civ. App. 1984) (upholding five-year limitation period) *with Patricia R. v. Peter W.*, 120 Misc. 2d 986, 466 N.Y.S.2d 994 (N.Y. Fam. Ct. 1983) (striking down five-year statute).

[6] *See, e.g., Alexander v. Commonwealth*, 708 S.W.2d 102 (Ky. Ct. App. 1986) (striking down four-year statute); *State Dept. of Health v. West*, 378 So. 2d 1220 (Fla. 1979) (same); *Smith v. Cornelius*, 665 S.W.2d 182 (Tex. Ct. App. 1984) (same); *Moore v. McNamara*, 40 Conn. Supp. 6, 478 A.2d 634 (1984) (striking down three-year statute); *Young v. Board of Education*, 661 S.W.2d 787 (Ky. Ct. App. 1983) (same); *State Dept. of Revenue v. Wilson*, 634 P.2d 172 (Mont. 1981) (same); *Lenoir ex rel. Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E.2d 816 (1980) (same); *Callison v. Callison*, 687 P.2d 106 (Okla. 1984) (same); *State ex rel. S.M.B. v. D.A.P.*, 168 W. Va. 455, 284 S.E.2d 912 (1981) (same).

1. The period for obtaining support granted by the state to non-marital children is sufficiently long to provide those wth an interest in such children a reasonable opportunity to file suit; and
2. The time limitation placed on that opportunity is substantially related to the state's interest in preventing the litigation of stale and fraudulent claims.[7]

While purporting to apply these standards, none of the state courts which have addressed the constitutionality of these limitation periods—including the court below—articulates a reasoned basis for distinguishing the five- to six-year limitation periods (which have received mixed constitutional reviews) from the one- to four-year periods found plainly insufficient to pass constitutional muster.

The one thing these decisions make clear is the need for review by this Court. Only this Court can rectify the incorrect application of its equal protection standards by the court below and effectively resolve the confusion among the state courts. Given the important federal interest associated with child support-related paternity actions, this issue should be resolved by this Court.

II. The Decision Below That The State's Eighteen-Year Statute of Limitation For Paternity Actions Should Not Be Retroactively Applied Is Inconsistent With The Federal Child Support Enforcement Amendments And With The Policies Underlying Those Amendments.

In determining that the newly-enacted and federally-mandated eighteen-year state statute of limitation for paternity actions does not apply retroactively, the court below failed to recognize the essential link between the new limitation period and the Child Support Enforcement Amendments of 1984 ("the Amendments"), 42 U.S.C.

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[7] *Pickett v. Brown*, 462 U.S. at 12-13.

§§ 651-667 (Supp. III 1985). It therefore ignored the intent of and policies underlying the Amendments and, in so doing, misconstrued the state statute. Because the decision below is inconsistent with, and severely undermines the goals of, the Amendments, the Court should review it.

Congress unanimously enacted the Amendments to improve the effectiveness of already existing child support programs. The Amendments require that, to remain in compliance with the child support enforcement program, and specifically the program for Aid to Families with Dependent Children ("AFDC"), Title VI, Part A of the Social Security Act, 42 U.S.C. §§ 601-673 (1982), each state must adopt "[p]rocedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday." 42 U.S.C. § 666(a)(5) (Supp. III 1985). By its plain language, this provision requires states to permit paternity actions at *any* time before a child reaches age eighteen. It provides no exclusion for claims which would already have been barred by lesser statutes of limitation.

That Congress intended to permit the filing of claims of all children less than eighteen years of age—regardless of whether a state's existing limitation period barred that claim—is further demonstrated by the legislative history of the Amendments. That history reflects Congress' great concern over the growing number of single women raising children and an intent to develop appropriate procedures so that all children can obtain needed parental support. For example, Senator Dole, echoing the concerns of a number of his Senate and House colleagues, noted:

> Every year the parents of 1.2 million children are divorced and another 700,000 children are born out of wedlock. Incredibly, half of the children born this year [1984] are expected to live in single parent families before the age of 18. This disturbing trend has led to a rapid increase in the number of child support and paternity cases . . . .

130 Cong. Rec. S4802 (April 25, 1984). Similarly, Senator Bradley pointed out that the number of single parent families increased 100 percent between 1970 and 1980, and that women headed ninety percent of these families. 130 Cong. Rec. S4811 (April 25, 1984).[8] Congress recognized that many of these women and children were already, or would eventually become, public charges unless it enacted effective legislation to compel parents, especially fathers, to meet their support obligations.[9]

Restrictive state statutes of limitation in paternity actions were stumbling blocks to such effective legislation. As the House Ways and Means Committee Report noted,

> [I]f a state's applicable statute of limitations does not permit establishment of paternity past the child's second, sixth or other birthday, it will be impossible ever to establish support orders on behalf of children past these ages and therefore impossible to obtain support for them.

H.R. Rep. No. 527, 98th Cong., 1st Sess. at 38 (1983). By requiring state compliance with an eighteen-year statute of limitation, Congress intended to "assure that *all* children in the United States who are in need of

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[8] *See also id.* at S4811 (April 25, 1984) (statement of Sen. Bradley); *id.* at S9586 (August 1, 1984) (Sen. Durenberger); *id.* at S4812 (April 25, 1984) (Sen. Trible); 130 Cong. Rec. H9974 (Nov. 16, 1983) (Rep. Conable); *id.* at H9980 (Rep. Mikulski).

[9] Senator Moynihan noted the growing number of single parent families headed by women, 52 percent of whom had incomes below the poverty line. The Senator concluded that lack of child support from the absent parent was the "compelling explanation" for this phenomenon. 130 Cong. Rec. S4808 (April 25, 1984); *id.* at S4811 (Sen. Bradley). Senator Hawkins expressed concern over the social costs implicit in these numbers: 80 percent of families seeking AFDC support did so as a result of insufficient support from an absent parent. *Id.* at S4812.

assistance in securing financial support from their parents will receive such assistance." 130 Cong. Rec. H9974 (Nov. 16, 1984) (statement of Rep. Rostenkowski) (emphasis added).

Indeed, the intent of Congress to provide relief to all children, without restriction, was so evident that the Department of Health and Human Services, in adopting federal regulations implementing the Amendments, stated that elaboration on the eighteen-year statute requirement was not necessary "[s]ince it is clear that cases previously considered to be closed because of the child's age will now have to be reopened and services provided." 50 Fed. Reg. 19,608, 19,631 (1985).

Clearly, in enacting the Amendments, Congress meant to remedy a national problem of major proportions. According to the U.S. Census Bureau, of the more than two million mothers of non-marital children as of the spring of 1986, only 370,000 were actually awarded child support payments.[10] Significantly, 85,000 such women could not receive a child support order because they were unable to establish the paternity of their children.[11] Moreover, in 1985, of the over one million unmarried mothers with children below the poverty line, over 950,000 of these women received no child support.[12]

Because Pennsylvania's new statute of limitation was enacted specifically to bring the state into compliance with the Amendments, it must be interpreted consistently with those Amendments. But it has not been. Rather, in refusing to apply Pennsylvania's new eighteen-year statute retroactively, the court below has thwarted clear Congressional intent to make obtaining child support

[10] Bureau of the Census, U.S. Dept. of Commerce, *Child Support and Alimony: 1985, Current Population Reports*, Series P-23, No. 152 at 2-3 (Tables B and C).

[11] *Id.* at 12 (Table 2).

[12] *Id.* at 11 (Table 1).

easier in all jurisdictions and to remove bars to valid paternity claims. The goals of providing all children with the means to obtain child support from both parents, and, thus, of reducing the burden placed on public assistance programs, clearly are frustrated if any or all of the states apply the new eighteen-year limitation statute prospectively only.[13]

Indeed, prospective application leads to an absurd result. Pennsylvania's congressionally-mandated eighteen-year statute took effect in January, 1986. By allowing prospective application only, the Pennsylvania court has declared that the federal program, which was intended to be in effect in all states by 1986,[14] will be phased-in over a twelve year period in Pennsylvania. The protection of the Amendments' limitation provision will not be available to all non-marital children in that jurisdiction until 1996. As a result, benefits from reduced welfare costs resulting from increased child support contributions necessarily will be reduced in accordance with the number of children deprived of the ability to establish paternity.

The Pennsylvania court's decision thus undercuts rather than promotes the purposes and policies underlying the Amendments. It leaves thousands of those whom Congress intended to aid without the very help contemplated by Congress—a chance to obtain monetary support from their parents. In fact, since 1969 nearly 410,000 children have been born out of wedlock in Pennsylvania.[15] By clear directive of the Amendments, each one of those children would have a current right to file a paternity claim. While figures on the number of paternity determinations have only been kept by the Department of Health

[13] The aggregate amount of child support payments received in 1985 amounted to some $7.2 billion. *Id.* at 6.

[14] Pub. L. 98-378, § 3(g)(1), (3).

[15] National Center for Health Statistics, *Vital Statistics of the United States*, Vol. 1 Natality, 1969-1982; *Advance Report of Final National Statistics*, 1983-1985.

and Human Services since 1980,[16] it is likely that as a result of the decision of the court below, thousands, indeed even hundreds of thousands, of these children have been denied that right. Because this case presents an important question of federal law, this Court should grant the Petition and resolve the critical statutory and policy issues presented.

CONCLUSION

For all of the foregoing reasons and for the additional reasons advanced in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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[16] *See* Office of Child Support Enforcement Amendments, U.S. Dept. of Health and Human Services, *Annual Report to Congress*, 1980-1985.